No. 07-89

FILED
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IN THE

Supreme Court of the United States

TEODORO TOLEDO and JOSEPH TUCKER,
Petitioner,

versus

ALPHONSO JACKSON, SECRETARY, U.S. DEPARTMENT OF HUD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Did the federal court have jurisdiction pursuant to 5 U.S.C. § 7101 et. seq. over employees who seek a judicial remedy for grievances arising under the negotiated procedures contained in the employee's collective bargaining agreement?

PARTIES TO THE PROCEEDING

The Parties herein:

Teodoro Toledo ..... Petitioner

Joseph Tucker ..... Petitioner

Alphonso Jackson, Secretary,
U.S. Department of HUD ..... Respondent

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

TEODORO TOLEDO
JOSEPH TUCKER — *Petitioner*

versus

ALPHONSO JACKSON Secretary,
U.S. Department of HUD — *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The opinion sought to be reviewed is that of the Sixth Circuit Court of Appeals in Teodoro Toledo and Joseph Tucker vs. Alphonso Jackson, Secretary, U. S. Department of HUD, 2007 (Sixth Circuit Court No. 06-5887). The case is recommended for full text publication.

JURISDICTION

This is a case arising under 5 U.S.C. § 7101 et seq.

The Notice of Appeal was filed June 29, 2006.

The jurisdiction of the Supreme Court of the United States is conferred by Rule 19 of the Supreme Court of the United States of America and 28 USC §2101.

STATUTE

The statute involved in this case is 5 U.S.C. §7101 et. seq, including 5 U.S.C. §7121.

STATEMENT OF THE CASE

A. Overview

1. The case herein arises out of the action of the United States Department of Housing and Urban Development in refusing Petitioners their rights under the Collective Bargaining Agreement, thus depriving Petitioners of their rights set forth in that agreement.

Teodoro Toledo and Joseph Tucker, were federal employees working for the United States Department of Housing and Urban Development (hereinafter referred to as "HUD").

Mr. Toledo and Mr. Tucker allege that HUD breached the Collective Bargaining Agreement with their union, The American Federation of Government Employees (hereinafter referred to as "AFGE") and filed a grievance through their union against the management of the HUD office located in Louisville, Kentucky.

The substance of Mr. Tucker and Mr. Toledo's grievance was that HUD violated the labor contract by not producing documentation related to a job for which both applied but were denied. In step one of the grievance procedure the union representative of Mr. Tucker and Mr. Toledo settled their grievance against their stated wishes. At the time of the settlement, the union representative, Lisa Lowery informed Mr. Tucker and Mr. Toledo that they individually were not bound by the decision of the union to settle the grievance. Ms. Lowery had arrived at this decision after discussion with management representative, Ms. Swann, during which she and Ms. Swann agreed that Mr. Toledo and Mr. Tucker individually were not bound by the settlement agreement between the union and HUD. Because of

the settlement agreement, Mr. Toledo and Mr. Tucker were precluded from following the grievance procedure and appealing their grievance to the second and/or third steps and/or arbitration through the grievance procedure.

The Petitioners brought this lawsuit pursuant to 5 U.S.C. § 7101 et. seq. as interpreted by ***Mudge v. United States,*** 308 F.3d 1220 (Fed. Cir., 2002).

B. Facts

1. At all times applicable herein, Petitioners, Teodoro Toledo and Joseph Tucker, worked at the office of the Department of Housing and Urban Development ("HUD") located in Louisville, Kentucky in the Western District of Kentucky.

2. In the year 2000 Mr. Toledo and Mr. Tucker applied for positions as community builders and were not selected for those positions. Mr. Tucker and Mr. Toledo were in non-management positions which were represented by the American Federation of Government Employees (AFGE).

3. There was considerable controversy concerning the awarding of the community builder positions. The AFGE requested that the Agency provide all records regarding the selection of the community builder position. The union also filed an unfair labor practice charge with the Federal Labor Relations Authorities. On September 11, 2002, the FLRA issued an order requiring HUD to provide the records regarding the community builder position.

4. HUD provided some additional documents but responded also that it was unable to provide all of the records used for the filling of the position.

5. Because of HUD's inability to provide documents which were or should have been in its possession at all times, the local of the AFGE filed a grievance on behalf of Petitioners, Teodoro Toledo and Joseph Tucker and also on behalf of another local employee, Deborah Knight. The

grievar asked for the disclosure of all records used in the filling of the community builder position. In addition, the grievance asked that Tucker, Toledo and Knight be awarded the community builder position or an equivalent position thereto.

6. The president of the local union, Local 530 of the AFGE that represented Mr. Toledo and Mr. Tucker was an individual from Nashville, Tennessee, named Lisa Lowery.

7. At the first step of the grievance procedure, Lowery settled the union's grievance on behalf of the union with management.

8. Ms. Lowery has testified that she discussed the settlement agreement with Deborah Swann, a management representative and that she and Ms. Swann agreed that the grievance was binding on the union and upon management but was not binding on the individuals, Mr. Toledo, Mr. Tucker and Ms. Knight.

9. The agreement was drafted by management representative, Swann.

10. Ms. Lowery testified specifically that the agreement between management and union did not take away any individual rights.

11. Mr. Toledo and Mr. Tucker informed Ms. Lowery that they were unhappy with the settlement and that they may seek remedies on their own.

12. The settlement agreement blocked Mr. Toledo and Mr. Tucker's right to take the grievance to steps two and three of the grievance procedure but other than that, they could do whatever they wished per Ms. Lowery's testimony and her testimony with Deborah Swann.

13. Mr. Tucker specifically informed Lisa Lowery that he did not agree with the settlement agreement.

14. Mr. Tucker told Ms. Lowery that if she signed the

settlement agreement that she wasn't doing it on his behalf.

15. AFGE president, Carolyn Federoff testified that if the employee doesn't agree with the settlement agreement that she would have taken the grievance through step three of the grievance procedure.

ARGUMENT

A. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION

The Petitioners believe that this case very simply hinges upon the interpretation and application of 5 U.S.C. § 7101 as it was interpreted in the case ***Mudge v. United States, supra.*** In the ***Mudge*** case, the Federal Circuit ruled that with the addition of the word "administrative" in 1994 to the text of the CFRA (5 U.S.C., §7101 et. seq.) federal employees have the right to seek a judicial remedy for employee grievances arising under the negotiated procedures contained in an employee's collective bargaining agreement. The Eleventh Circuit Court of Appeals has also adopted this view. See: ***ASEDAC v. Panama Canal Commission,*** 329 F.3d 1235, 1241 (11th Cir., 2003).

The Supreme Court accepted the case of ***Whitman vs. Department of Transportation,*** 547 U.S. _____ (2006) with the apparent purpose of deciding the issue but remanded the case on other grounds.

At the Trial Court, the Agency relied upon ***Ryon v. O'Neill,*** 894 F.2d 199 (6th Cir., 1990). That case is not applicable to the case before this court in that it predated both the ***Mudge*** decision which was issued in 2002 and it also predated the 1994 amendment to the CFRA. The ***Ryon*** case is not precedential in this case because it predated the amendment to the CFRA.

The Supreme Court, in its decision in the ***Whitman*** case, stated that the issue was not whether 5 U.S.C. 7121(a)(1)

confers jurisdiction to the Federal District Courts in cases such as this one but whether there is anything in §7121 (or the CSRA) as a whole that "divest the district courts of their authority under 28 U.S.C. §1331 ... or otherwise precludes employees from pursuing remedies set out in the CSRA, cf. ***United States v. Fausto,*** 484 U.S. 439, 443-444, (1988); ***Abbott Laboratories v. Gardner,*** 387 U.S. 136, 140 (1967)."

The Appellant submits that nothing in the CSRA divests the Federal Courts of jurisdiction in this matter.

The Court should follow the ***Mudge*** decision and overrule the order of the Sixth Circuit Court of Appeals which upheld the decision of the Trial Court.

B. THE SETTLEMENT AGREEMENT BETWEEN THE UNION AND HUD DID NOT CONSTITUTE AN ACCORD AND SATISFACTION OF MR. TUCKER AND MR. TOLEDO'S CLAIMS

When they were informed about the settlement agreement, both Mr. Tucker and Mr. Toledo complained and disagreed to their union representative, Lisa Lowery regarding the agreement. With regard to Mr. Tucker's feelings regarding the agreement, his deposition testimony is enlightening. When asked in his deposition if the parties came to an agreement, he responded, "No, not for me they didn't." When he was asked if the grievance was settled at step one by a settlement agreement, he responded, "Not as far as I am concerned." He again testified that he didn't agree with the agreement. When asked if he ever told Ms. Lisa Lowery not to sign the agreement, Mr. Tucker testified, "Not – not directly. I told her that I didn't agree with it but if she signed it wouldn't commit me to anything as far as I was concerned." Mr. Tucker further testified regarding Ms. Lowery's signing of the agreement. "I didn't tell her what to do one way or the other. I felt it was her decision. I said, but if you sign it, you won't be signing it on my behalf because I reserve the right to – to seek – to seek legal advice..."

While testimony of Mr. Tucker is enlightening, the testimony of Ms. Lowery is critical to the issue in this case. Ms. Lowery was the president of AFGE Local 530 and was the union representative for the grievance and settlement in question. With regard to the settlement agreement in question, Ms. Lowery discussed and entered into that agreement on behalf of the local union with management representative, Deborah Swann who drafted the agreement. Ms. Lowery and Ms. Swann went over the agreement paragraph by paragraph to make sure that they have the same understanding of the agreement and it was agreed between the management and union representative that the agreement did not bind the individuals but just the local. With regard to the settlement agreement, Ms. Lowery testified;

A. "I know I discussed that particular thing with Deborah Swann. We actually went through the settlement agreement paragraph by paragraph to make sure that we both have the same understanding on the settlement agreement.

Q. Then why don't you tell me what that understanding was as it relates to my question about precluding the individuals from pursuing another remedy.

A. That answer is absolutely no. I could not bind - - I cannot bind the individuals from filing anything on their own. I can only bind Local 530, and after we get this settlement agreement, we are not going to pursue it in other court means that we would have available to us.

Q. Are you saying, testifying here today that Ms. Swann confirmed that was her understanding as well?

A. Yes. We went through this paragraph by paragraph.

Q. And specifically, the question was posed to Ms. Swann with regard to whether or not the individuals named in this grievance, Ted Toledo or Joe Tucker, could move forward with pursuit of some other legal remedy?

A. We actually went through that paragraph. I gave her my understanding and she stated that, yes, that was correct, because I would not have signed a settlement agreement that took away t he employee's rights." (Petitioners' Response to Motion for Summary Judgment).

Ms. Lowery further testified with regard to the rights of Mr. Tucker and Mr. Toledo to pursue their claim individually, "If anyone had told me that, it would not have been signed as far as preventing them from pursuing it on their own. When asked if anyone ever told her that the settlement agreement did not bind Joe Tucker or Ted Toledo, Ms. Lowery testified, "Deborah Swann"

By the testimony of Ms. Lowery, it is very clear that the parties, through their representatives in their negotiations, entered into the agreement specifically agreeing that Mr. Tucker and Mr. Toledo could pursue their claims individually. If Ms. Swann were to disagree with the testimony of Ms. Lowery regarding this matter that would very obviously create a question of material fact which would preclude summary disposition in this matter.

Whether the parties had an agreement and that agreement was that Mr. Tucker and Mr Toledo could pursue their claims individually or the parties had no agreement and that there was not a meeting of the minds between Ms. Lowery and Ms. Swann. In either case there would no accord and satisfaction and there would be no agreement precluding Mr. Tucker and Mr. Toledo from pursuing their cases individually.

REASONS FOR GRANTING THE WRIT

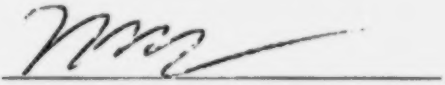
This case should be reviewed because the interpretation of 5 U.S.C. 7121(a)(1) remains confused. The Supreme Court in its decision in the Whitman case stated that the issue was not whether 5 U.S.C. 7121(a)(1) confers jurisdiction to the federal district court in cases such as this one but whether

there is anything in §7121 (or the CSRA) as a whole that divests the district court of their authority under 28 U.S.C. §1331 or otherwise precludes employees from pursuing remedies set out in the CSRA, cf. ***United States v. Fausto,*** 484 U.S. 439, 443-444 (1988); ***Abbott Laboratories v. Gardner,*** 387 U.S. 136, 140 (1967).

The Sixth Circuit Court of Appeals does not determine whether there is anything in §7121 or the CSRA that divests the district court of their authority under 28 U.S.C. §1331 but instead rules that there is nothing in 5 U.S.C. § 1721 which gives the Court jurisdiction.

The Supreme Court should hear this case to clarify these issues.

Respectfully Submitted



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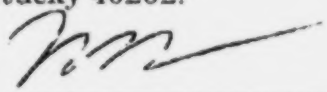
CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing Petition for a Writ of Certiorari was mailed to Mr. Michael D. Ekman, Assistant U. S. Attorney, 510 West Broadway, 10th Floor, Louisville, Kentucky 40202.



MICHAEL L. BOYLAN
Attorney for Petitioner

APPENDIX

After HUD determined that it was unable to provide all the records required, AFGE filed a grievance on behalf of the Plaintiffs and CBA. The grievance asked for disclosure of all records regarding the filling of the position. The grievance also asked Plaintiffs be awarded the positions or the equivalent to them.

At the first step of the grievance procedure, AFGE settled the grievance with HUD. Plaintiffs and AFGE appear to disagree about whether Plaintiffs consented to the settlement. Plaintiffs informed the union that they were unhappy with the settlement and that they would seek their own remedies. The settlement agreement prohibited Plaintiffs from seeking further steps in the grievance procedure. This series of events raises the question of whether the settlement acts as an accord and satisfaction that bars any further claims on the issue. Because the Court finds that other grounds clearly resolve the case, the issue of accord and satisfaction need not be discussed.

II.

The Court finds two separate grounds that compel dismissal of Plaintiffs' claims. First, no federal statute authorizes a federal court jurisdiction over employment-related claims covered by a CBA. Consequently, the government has not waived its sovereign immunity on this category of claim. Second, the CBA binds Plaintiffs" procedural remedies. It states that its provisions encompass the exclusive avenue of remedy.

A.

Absent an express waiver of sovereign immunity, the United States cannot be sued. *United States v. Sherwood,* 312 U.S. 584 (1941). The government has waived its sovereign immunity as to may classes of cases. However, many cases have confirmed that none of the general waivers apply to the more specific instance of an employee grievance covered by a CBA.

Plaintiffs argue that a 1994 amendment to the Civil Service Reform Act ("CSRA") (5 U.S.C. § 7101, *et seq.*), amounts to such an express waiver in these circumstances. Prior tot the amendment, the Supreme Court and all circuits addressing the issue, including most importantly the Sixth Circuit, had held the CSRA did not constitute a waiver of sovereign immunity as to disputes grievable under a CBA. *Carter v. Goldberg,* 498 U.S. 811 (1990); ***Ryon v. O'Neill,*** 894 F.2d 199, 201-205 (6th Cir. 1990).

Plaintiffs ask this Court to adopt the analysis of the Federal Circuit in *Mudge v. United States,* 308 F.3d 1220 (Fed Cir. 2002). That circuit held that the addition by Congress of the word "administration" to the CSRA exclusivity provision established a federal employee's right to seek judicial remedy for employment grievances subject to a CBA. *Id.* at 1227-32. For the reasons that follow this Court does not agree with the *Mudge* analysis.

In *Ryon v. O'Neill,* the Sixth Circuit convincingly concluded that the pre-amendment CSRA foreclosed a federal court jurisdiction of a government employee grievance. *Id.* First, the Court found that affirmative provisions of the CSRA established controlling provisions for review of agency personal actions. These provisions did not provide for separate direct proceedings in a federal court. *Id.* at 203-04. Second, citing *United States v. Fausto,* 484 U.S. 439 (1988), the Circuit concluded that the legislative history evidenced an intent to restrict judicial review of agency personnel actions. *Id.* at 204.

This court finds no statutory or legislative evidence from the amendment of 5 U.S.C. § 7121 (a)(1) to warrant a change of this analysis. This Court is not precisely sure what change in meaning may result from the addition of the word "administration" in this section. However, the Court can conclude that such a limited provision does not act to expressly confer federal court jurisdiction over claims covered by negotiated grievance procedures in CBA's. Consequently, the Court believes that the Ninth Circuit has set forth a view more consistent with the statutory language, legislative intent and administrative practice. See *Whitman v. Department of Transportation,* 382 F.3d 938 (9th Cir. 2004).

B.

The complaint undisputably states a claim for breach of the CBA. Article 22.01 of the CBA states that its provisions "constitute[s] the sole and exclusive procedure for the resolution of grievance by employees of the bargaining unit and between the parties." The CBA provision is consistent with the general statutory rules governing a federal employee challenge to a government agency personnel decision. The Civil Service Reform Act ('CSRA") provides only for a federal appeal of a final order of the merit System Protection Board or the Federal Labor Relations Authority. *See* 5 U.S.C. § 7123, 7703. Plaintiffs' complaint does not constitute such an appeal. Consequently, AFGE has expressly agreed on be-

half of its members that the employees of HUD, such as Plaintiffs, are bound to follow the CBA's exclusive remedial procedures as to and covered grievance.

III.

On June 27, 2005, the United States Supreme Court granted certiorari in *Whitman v. Department of Transportation* to address the conflict between the decisions of the Federal Circuit, the Eleventh Circuit and the Ninth Circuit. The Court heard oral argument on December 5, 2002. *See* www.supremecourtus.gov/oralarguments/argument_calendars.html.

Because the Supreme Court is likely to issue an opinion on this issue within the next few months, judicial economy, the convenience of the parties and the interests of justice are served best by a stay of a further order until the Supreme Court has settles the circuit conflict.

This Court will enter an order consistent with this Memorandum Opinion.

APPENDIX B

UNTIED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:04CV-466-H

TEODORO TOLEDO and
JOSEPH TUCKER — *Plaintiffs*

v.

ALPHONSO JACKSON, Secretary,
U.S. Department of Housing and
Urban Development — *Defendant*

OPINION—Decided and Filed June 8, 2006

ORDER

The Supreme Court has issued an Order remanding *Whitman v. Dept. of Transportation* to the Ninth Circuit for a determination of whether the plaintiff was alleging a "prohibited personnel practice" under 5 U.S.C. § 2302, rather than a breach of a collective bargaining agreement under 5 U.S.C. § 7121. The Court expressed no opinion on whether 5 U.S.C. § 7121 removes the jurisdiction given to the federal court over "all civil actions arising under the Constitution, laws, or treaties of the united States" by virtue of 28 U.S.C. § 1331, although it noted that the question here should be "not whether 5 U.S.C. § 7121 confers jurisdiction, but whether § 7121 (or the CSRA as a whole) removes the jurisdiction given to the federal courts." *Whitman v. Dept. of Transportation,* 2006 WL 1519407 (June 5, 2006) (citing *Verizon Md. Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 625 (2002)). Because it appears that the Supreme Court will not resolve the jurisdictional question in the near future, the Court believes it best to issue an order based upon its previously published Memorandum Opinion.

In its Memorandum Opinion dated April 20, 2006, the Court concluded that no federal statute, in particular 5 U.S.C. § 7101 et seq., confers federal court jurisdiction over statutory and constitu-

tional claims concerning employment-related matters within the scope of a federal employee's collective bargaining agreement. Further, Congress's 1994 addition of the word "administrative" does not change the plain meaning of 5 U.S.C. § 7121 (a)(1) – that the grievance procedures set out in an employee's collective bargaining agreement "shall be the exclusive procedures for the resolving grievance which fall within its coverage."

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion to dismiss is SUSTAINED and Plaintiff's complaint is DISMISSED WITH PREJUDICE.

This is a final order.

APPENDIX C

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0150p.06

UNTIED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TEODORO TOLEDO and
JOSEPH TUCKER
Plaintiffs-Appellants,

v.

ALPHONSO JACKSON, Secretary,
U.S. Department of Housing and
Urban Development
Defendant-Appellee.

No. 06-5887

Opinion of the United States Court of Appeals for the Sixth Circuit, entered May 1, 2007

Appeal from the United States Distrcit Court
for the Western District of Kentucky at Louisville.
No. 04-00466—John G. Heyburn II, Chief District Judge.

Argued: March 15, 2007

Decided and Filed: May 1,2007

Before: KENNEDY, MARTIN, and SUTTON,
Circuit Judges.

COUNSEL

ARGUED: Micheal L. Boylan, Louisville, Kentucky, for Appellants. Terry M. Cushing, ASSISTANT UNITED STATES ATTORNEY, Louisville, Kentucky, for Appellee. ON BRIEF: Micheal L. Boylan, Louisville, Kentucky, for Appellants. Terry M. Cushing, Monica Wheatly, ASSISTANT UNITED STATES ATTORNEY, Louisville, Kentucky, for Appellee.

SUTTON, Circuit Judge. Teodoro Toledo and Joseph Tucker claim that the United States Department of Housing and Urban Development (HUD) breached their rights under a collective bargaining agreement. Because Toledo and Tucker failed to establish the district court's jurisdiction over the suit, we affirm.

I.

Toledo and Tucker tried, and failed, to obtain "community builder" positions within HUD. After HUD rejected their transfer applications, the American Federation of Government Employees (the union) asked HUD on behalf of Toledo and Tucker to release the placement records that it had considered in filling the positions. Unsatisfied with HUD's response, the union filed a complaint with the Federal Labor Relations Authority, after which the Authority ordered HUD to provide additional records to the union. While HUD provided some of the relevant records, it failed to send all of them. "Despite a diligent search," the agency explained, it "was unable to locate all of the competitive placement records." JA 50

Toledo, Tucker, and Deborah Knight—a third unsuccessful communtiy-builder applicant—responded by pursuing a grievance against HUD under the union's collective bargaining agreement. Lisa Lowery, the president of the local union chapter, filed the grievance on their behalf.

During step one of the three-step grievance procedure, Lowery and Deborah Swann, a HUD representative, negotiated a settlement agreement. The agreement (1) granted Toledo, Tucker and Knight "[p]riority [c]onsideration" for future vacancies at HUD and (2) acknowledged that the settlement "constitute[d] a waiver of all appeal rights respective of this action to any Federal administrative agency or Federal court." JA 53

Apparently unsatisfied with this resolution of the grievance, Toledo and Tucker (though not Knight) filed a claim in federal court alleging that HUD violated their rights under the collective bargaining agreement. Their complaint repeated, word for word, the allegations in the grievance filed with the agency. The district court dismissed the case, concluding that no statute granted it jurisdiction to resolve disputes "concerning employment-related matters within the scope of a federal employee's collective bargaining agreement." JA 17. Toledo and Tucker Appeal.

II.

The district court did not reach the merits of Toledo and Tucker's claim, and neither do we, for they have not established that the district court had jurisdiction over their claim. *See Welsh v. Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980). Not one of the plaintiffs' proposed bases for jurisdiction—28 U.S.C. §§ 1331, 1343 or 2201—suffices to give the federal courts authority to resolve this dispute.

Section 1331 is the general federal-question-jurisdiction statute. Because Toledo and Tucker named the secretary of HUD in his official capacity, they must do more than invoke this general statute; they also must "identify a waiver of sovereign immunity in order to proceed." *Reetz v. United States*, 224 F.3d 794, 795 (6th Cir. 2000); *see also United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993) (affirming dismissal of suit against federal agency because federal sovereign immunity "extends to agencies of the United States" and "[t]he federal question jurisdictional statute is not a general waiver of sovereign immunity").

Toledo and Tucker have failed to satisfy this requirement. Rather than invoking an applicable waiver of immunity, they essentially have used the federal-question statute to bring a claim for breach of contract—breach namely of the collective bargaining agreement between HUD and the union. *See* JA 6 (claiming that HUD "refus[ed] Plaintiffs their rights under the Collective Bargaining Agreement" by failing to follow the agreement's procedures for filling the vacant positions Toledo and Tucker unsuccessfully sought). Although Toledo and Tucker claim that their suit is "authorized and instituted pursuant to the labor agreement in effect between" the union and HUD, Br. at 1, it is by no means clear that a collective bargaining agreement by itself could impact the immunity of a federal agency. *Cf.* 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3655, at 348 (1998) ("When a federal agency is the named defendant in an action, the general rule... is that the agency may be sued only if the *Congress* has consented to the action...") (emphasis added). Nothing about the agreement, at any rate, purports to empower the *federal courts* to resolve employee grievances; alleged breaches of the agreement amount to grievances within the coverage of these; and the grievance procedures established by the agreement "constitute[] *the sole and exclusive*

procedure[s] for the resolution of grievances by employees of the bargaining unit," JA 54 (emphasis added).

Sections 1343 and 2201, for their part, do no better when it comes to giving the federal courts jurisdiction over this matter. Section 1343 grants district courts jurisdiction over civil actions to, among other things, "recover damages or to secure equitable... relief under any Act of Congress providing for the protection of civil rights." 28 U.S.C. § 1343(a)(4). But plaintiffs filed this lawsuit under "the labor agreement in effect between" the union and HUD, JA 5, not under any statute, much less under a civil rights statute. Despite the ruling against them below, plaintiffs have not pointed to any authority for the proposition that § 1343 gives the federal courts authority to resolve such a collective-bargaining dispute against a federal agency.

Section 2201 is part of the Declaratory judgement Act. Before "invoking the Act," however, a federal court must "have jurisdiction already" under some other federal statute. *Heydon v. MediaOne of S.E. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003). Put another way, the Act is not "an independent basis for federal subject matter jurisdiction," *id.; see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950), and plaintiffs have not identified any other congressional statute that gives the federal courts jurisdiction over this dispute.

Also unavailing is plaintiffs' reliance on a line of cases from the Federal Circuit. In *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), the Federal Circuit held that the Civil Service Reform Act (CSRA), 5 U.S.C. § 7107 *et seq.*, precluded federal courts from exercising jurisdiction over claims falling within the scope of grievance procedures established by collective bargaining agreements between a federal agency (in this case, the IRS) and its employees. *Carter*, 909 F.2d at 1454. The court based its conclusion on § 7121(a)(1) of the Act, which at that time read that "the procedures [set out in the collective bargaining agreement] shall be the exclusive procedures for resolving grievances which fall within its coverage.'" *Id.* (quoting 5 U.S.C. § 7121(a)(1)). According to the Federal Circuit, that language "foreclosed... avenue[s] to the courts, pre-CSRA, had been open to federal employees by statute." *Id.* at 1456.

In 1994, however, Congress amended § 7121(a)(1), adding one word. The provision now says that " the procedures [set out in the collective bargaining agreement] shall be the exclusive *administrative* procedures for resolving grievances which fall within

its coverage." (Emphasis added). In *Mudge v. United States,* 308 F.3d 1220 (Fed. Cir. 2002), the Federal Circuit held that the 1994 amendment effectively overruled *Carter:* Because Congress added the word "administrative" to § 7121(a)(1), "that subsection, no longer restricts a federal employee's right to pursue an employment grievance in court." *Id.* at 1232; *see also Asociacion De Empleados Del Area Canalera v. Panama Canal Comm'n,* 329 F.3d 1235, 1241 (11th Cir. 2003) (same).

Even for the sake of argument we were to accept *Mudge* as the accurately construing the CSRA, that does not solve plaintiff's problem. For one, they still have not identified an applicable waiver of sovereign immunity—by, say, invoking the Administrative Procedure Act. *See* 5 U.S.C. § 702. For another, they cannot tenably claim that § 71219a)(1) by itself confers jurisdiction. It is one thing to say that the statute does not restrict an employee's right of action, which is what *Mudge* says; it is quite another to say that the statute creates jurisdiction to hear the right of action, which no case says. As the Supreme Court confirmed in *Whitman v. Department of Transportation,* 126 S. Ct. 2014 (2006), § 7121(a)(1) "does not confer jurisdiction," *id.* at 2015. Although it "or the CSRA as a whole" may, contrary to *Mudge,* "remove[] the jurisdiction [otherwise] given to the federal courts.' *id.,* the Supreme Court did not answer that question in *Whitman,* and neither need we answer it in this case.

For these reasons, we affirm.

APPENDIX D
[EXCERPTS FROM 28 USC §2101]

TIME FOR APPEAL—S.C.T.

28 § 2101. Supreme Court; time for appeal or certiorari; docketing stay

(a) A direct appeal to the supreme Court from any decision under Section 1253 of this title, holding unconstitutional in whole or in part, by Act of Congree, shall be taken within thirty days after the entry of the interlocutory ir final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of the district court in any civil action, suit or preceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within thirty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninetly days after the entry of such judgment or decree. A justice of the Supreme Court, for good casue shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for apeal or applications for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An Application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement os such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtian a writ certiorari from teh Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by

such judge or justice, that is the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to make his plea good granting his application, or fails to obtain an order granting his application, or fails to make his plea to the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104; Dec. 6, 1983, Pub.L. 98—209, § 10(b), 97 Stat. 1406; June 27, 1988, Pub.L. 100—352, § 102 Stat. 663.)

5 U.S.C. § 7101. Findings and purpose

(a) The Congree finds that–

(1) experience in both private and public employment indicates that statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them–

(A) safegaurds the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to faicilitate and improve employee performance and the efficiant accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is th epurpose of this chapter to prescribe certain rights and obligations of the enployees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the government. The provisions of this chapter should be interpreted in a manner

consistant with the requirment of an effective and efficient Government.

5 U.S.C. § 7121 Grievance procedures

(a)

(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided is subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievance which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter form the application of the grievance procedures which are provided for in the agreement.

(b)

(1) Any negotiation grievance procedure reffered to in subsection (a) of this section shall–

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that–

(i) assure an exclusive representative the right, in its own behalf or any employee in the unti represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievacne on the employee's own behalf, and assure the exclusive representative the right to be present and process grievacnes;

(iii) provide that any grievacne not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by wither the exclusive representative or the agency.

(2)

(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(c)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitratir to order–

(i) a stay of any personnel action in a manner similar to the manner described in section 1221 (c) with respect to the merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215 (a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action identified under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with the respect to any other grievance concerning–

(1) any claimed violation under subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title; or

(4) any examination, certification, or appointment; or

(5) the classification of any postion which doe snot result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibition personnel practice under section 2302 (b)(1) of this title which also falls under the coverage of the negotiated grievance procedure, but noth both. An employee shall be deemed to ahve exercised his opinion under this subsection to raise the matter under either a statutory procedure or the negotiation procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions if the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commision to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Employment Opportunity Commision.

(e)

(1) Matters covered under sections 4303 and 7512 of this title whcih also fall within the coverage of the negotiated grievace procedure may, in the discrestion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems aplicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his opinion under this subsection to raise a mater either under the applicable appellate procedures or under the negotiated grievacne procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negoiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701 (c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which are arise under other personnel systems and which an aggrieved employess has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the smae manner and on the same basis as could be obtained of final decision in such matters raised under apllicable appellated procedures.

(g)

(1) This subsection applies with respesct to a prohibited personnel practice other than a prohibited personeel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in pargraph (3) with respect thereto. For purposes of the preceding sentence, a determintaion as to whther a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follow:

(A) An appeal to the Merit Systems Protection board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection,a person shall be considered to have elected–

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedure;

(B) the remedy described in paragraph (3)(B) if such person has timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph 3(C) if such person has sought corrective action form the Office of Special Counsel by making an allegation under section 1214 (a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596 (b)(4) of this title.

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SUPREME COURT, U.S.

No. 07-89

In the Supreme Court of the United States

TEODORO TOLEDO AND JOSEPH TUCKER,
PETITIONERS

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below improperly declined to entertain this suit alleging that a federal agency violated the terms of a collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A11) is reported at 485 F.3d 836. The initial memorandum opinion of the district court (Pet. App. A1-A4) and the subsequent opinion and order (Pet. App. A5-A6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2007. The petition for a writ of certiorari was filed on July 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were employees in the Louisville, Kentucky, office of the U.S. Department of Housing and Urban Development (HUD) when they applied for positions within HUD as community builders. Pet. App. A1, A8. When they were not selected, the union representing their bargaining unit, the local of the American Federation of Government Employees (AFGE or union), asked HUD to release the placement records it had considered in filling the positions. *Ibid.* When HUD did not release the records, the union filed an unfair labor practice charge with the Federal Labor Relations Authority (FLRA), which ordered HUD to release the records. *Id.* at A8. HUD provided only some of the relevant documents, explaining that others could not be located. *Ibid.*

Petitioners, represented by AFGE, filed a grievance against HUD pursuant to the union's collective bargaining agreement with HUD.[1] Their grievance alleged "that HUD violated the [collective bargaining agreement] by not producing documentation," and they asked to be "awarded the community builder position or an equivalent position." Pet. 2, 4.

At the first step of the collective bargaining agreement's three-step grievance procedure, the union and HUD negotiated a settlement. Under the terms of the settlement, petitioners were granted "Priority Consideration" for comparable future vacancies. C.A. App. 53. The agreement stated: "[T]his Agreement * * * shall constitute the full and complete resolution of this * * * [g]rievance, and further constitute a waiver of all appeal

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[1] AFGE also acted on behalf of a third HUD employee, Deborah Knight, who is not a party to this case. Pet. App. A8.

rights respective of this action to any Federal administrative agency or Federal court." *Ibid.*

2. Notwithstanding the settlement, petitioners filed suit against the Secretary of HUD in district court, alleging that HUD had violated "their rights under the Collective Bargaining Agreement." C.A. App. 6 (Compl. para. 7). In their prayer for relief, they sought an injunction preventing further violations of the collective bargaining agreement and awarding them the community-builder positions; a declaratory judgment that their rights had been violated; and "an award of damages for back pay, front pay, lost benefits, and compensatory damages." *Id.* at 7.

3. The district court granted HUD's motion for summary judgment on two separate grounds. In an initial opinion entered on April 21, 2006 (Pet. App. A1-A4), the district court determined (1) that no federal statute authorizes federal-court jurisdiction over employment-related claims covered by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 7101 *et seq.*, and (2) that the collective bargaining agreement provides petitioners' "exclusive avenue of remedy" and does not contemplate a suit like this one. Pet. App. A2, A5-A6.[2]

In elaborating on the first ground, the court explained that the United States cannot be sued "[a]bsent an express waiver of sovereign immunity." Pet. App. A2 (citing *United States* v. *Sherwood*, 312 U.S. 584 (1941)). The district court rejected petitioners' argument that 5 U.S.C. 7121(a)(1) provides such a waiver. That paragraph generally provides that "any collective bargaining

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[2] Because the court determined that it lacked jurisdiction over petitioners' suit, it did not address HUD's additional argument that the suit was barred because the settlement agreement constituted an accord and satisfaction of the dispute. Pet. App. A2.

agreement" between the government and an employees' union "shall provide procedures for the settlement of grievances, including questions of arbitrability," and further specifies that those procedures generally "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." *Ibid.*

In rejecting petitioners' reading of 5 U.S.C. 7121(a)(1) as a waiver of federal sovereign immunity, the district court declined (Pet. App. A3) to adopt the Federal Circuit's conclusion in *Mudge* v. *United States*, 308 F.3d 1220 (2002), that, since Section 7121(a)(1) was amended in 1994, it "no longer restricts a federal employee's right to pursue an employment grievance in court." *Id.* at 1232. Instead, the district court found more convincing (Pet. App. A3) the Ninth Circuit's opinion in *Whitman* v. *Department of Transportation*, 382 F.3d 938 (2004), vacated and remanded on other grounds, 126 S. Ct. 2014 (2006) (per curiam). The district court concluded that Section 7121(a)(1) is "such a limited provision" that it "does not act to expressly confer federal court jurisdiction over claims covered by negotiated grievance procedures." Pet. App. A3. Nevertheless, noting that *Whitman* was pending before this Court, the district court stayed further proceedings, pending a decision from this Court that it expected would "settle[] the circuit conflict" about the preclusive effect of Section 7121(a)(1). *Id.* at A4.

On June 5, 2006, this Court issued a per curiam decision in *Whitman* that vacated the Ninth Circuit's decision and remanded the case for further proceedings, but did not decide whether Section 7121(a)(1) forecloses federal-court jurisdiction over federal personnel matters. See *Whitman* v. *Department of Transp.*, 126 S. Ct. 2014, 2015-2016 (2006). On June 8, 2006, the district

court reaffirmed its prior determinations and issued an order dismissing petitioners' complaint. Pet. App. A5-A6.

4. The court of appeals affirmed. Pet. App. A7-A11. The court held that petitioners failed to establish that the district court had jurisdiction over their claims. *Id.* at A9. The court explained that, while petitioners relied on 28 U.S.C. 1331, that statute confers only general federal-question jurisdiction and does not supply the requisite waiver of sovereign immunity (as petitioners would need to proceed in their suit against the Secretary of HUD in his official capacity). Pet. App. A9.

The court of appeals noted that, even if the collective bargaining agreement could waive a federal agency's immunity, "[n]othing about the agreement" here "purports to empower the *federal courts* to resolve" claims against the agency, since, by its terms, "the grievance procedures established by the agreement 'constitute[] *the sole and exclusive procedure[s]* for the resolution of grievances by employees of the bargaining unit.'" Pet. App. A9-A10 (quoting C.A. App. 54).

The court of appeals also rejected petitioners' reliance on other statutory provisions to establish jurisdiction. With regard to 28 U.S.C. 1343, which grants jurisdiction over civil actions to recover damages or secure equitable relief "under any Act of Congress providing for the protection of civil rights," Pet. App. A10, the court explained that petitioners "filed this lawsuit under 'the labor agreement' * * * not under any statute, much less under a civil rights statute." *Ibid.* (quoting C.A. App. 5). With regard to 28 U.S.C. 2201, the court explained that the Declaratory Judgment Act "is not 'an independent basis for federal subject matter jurisdiction,' and [petitioners] have not identified any other con-

gressional statute that gives the federal courts jurisdiction over this dispute." *Ibid.* (quoting *Heydon* v. *MediaOne of S.E. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003)).

The court of appeals also rejected petitioners' reliance on the Federal Circuit's decision in *Mudge*, *supra*. The court concluded that, even if "for the sake of argument we were to accept *Mudge* as accurately construing the CSRA, that does not solve [petitioners'] problem" for two separate reasons. Pet. App. A11. First, they "still have not identified an applicable waiver of sovereign immunity—by, say, invoking the Administrative Procedure Act." *Ibid.* Second, "they cannot tenably claim that § 7121(a)(1) by itself confers jurisdiction. It is one thing to say that the statute does not restrict an employee's right of action, which is what *Mudge* says; it is quite another to say that the statute creates jurisdiction to hear the right of action, which no case says." *Ibid.* Moreover, the court noted, *Whitman* affirmatively "confirmed" that Section 7121(a)(1) "'does not confer jurisdiction.'" *Ibid.* (quoting *Whitman*, 126 S. Ct. at 2015).

ARGUMENT

Petitioners ask this Court to clarify "confus[ion]" about "the interpretation of 5 U.S.C. 7121(a)(1)." Pet. 8. But the prior circuit conflict about the effect of Section 7121(a)(1) was eliminated when this Court vacated the Ninth Circuit's decision in *Whitman* v. *Department of Transportation*, 382 F.3d 938 (2004), 126 S. Ct. 2014 (2006) (per curiam), and the court of appeals in this case did not take a position on the effect of Section 7121(a)(1). Moreover, even assuming that petitioners' claim arises under federal law and that there is a waiver of federal

sovereign immunity for some part of it, their case was properly dismissed because the CSRA provides no cause of action against federal agencies for violations of collective bargaining agreements. Further review is not warranted.

1. The CSRA provides that "any collective bargaining agreement" between the government and an employees' union "shall provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Until 1994, Section 7121(a)(1) also provided, with specified exceptions not pertinent here, that those "procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988). As part of a 1994 technical and conforming amendment, the word "administrative" was added to Section 7121(a)(1), which now provides that "the [collective bargaining agreement] procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

Following the 1994 amendments, two circuits have held that the addition of the word "administrative" eliminated the provision's earlier preclusive effect. See *Mudge* v. *United States*, 308 F.3d 1220, 1227 (Fed. Cir. 2002); *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Comm'n*, 329 F.3d 1235, 1241 (11th Cir. 2003). The Ninth Circuit held that "because the addition of the word 'administrative' to the statute does not constitute an express grant of federal court jurisdiction, * * * amended § 7121(a)(1) establishes no more than an exclusive administrative remedy." *Whitman*, 382 F.3d at 943. This Court, however, vacated the Ninth Circuit's decision in *Whitman* on other grounds, without reaching the question of how to

construe Section 7121(a)(1). *Whitman*, 126 S. Ct. at 2015-2016.

The Sixth Circuit below did not weigh in on this issue. It concluded that—even assuming "for the sake of argument" that *Mudge* "accurately" held that the CSRA does not restrict an employee's right of action in federal court—petitioners have failed to identify a statute, like the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, that affirmatively waives federal sovereign immunity. Pet. App. A11. As the court of appeals observed, petitioners must do more than identify some general grant of jurisdiction; they must "identify a waiver of sovereign immunity in order to prevail." *Id.* at A9.

Thus, in the wake of *Whitman*, there is no conflict in the circuits over the proper interpretation of Section 7121(a)(1), and petitioners have not identified any decision conflicting with the court of appeals' actual ruling in this case.

2. Petitioners imply that the court of appeals failed to heed this Court's decision in *Whitman*. Pet. 8-9. In *Whitman*, the petitioner claimed that his federal agency employer had subjected him to nonrandom drug tests, in violation of the Constitution and a federal statute dealing with drug testing. 126 S. Ct. at 2015. This Court noted that federal-court jurisdiction existed because Whitman's claims arose "under the Constitution, laws, or treaties of the United States." *Ibid.* (quoting 28 U.S.C. 1331). With that jurisdictional ground established, the Court further stated:

> The question, then, is not whether 5 U.S.C. § 7121 confers jurisdiction, but whether § 7121 (or the CSRA as a whole) *removes* the jurisdiction given to the federal courts, or otherwise precludes employees

> from pursuing remedies beyond those set out in the CSRA.

Ibid. (citations omitted; emphasis added).

Petitioners recount this passage from *Whitman* twice, and argue that it means the district court had jurisdiction over their claims by virtue of Section 1331. Pet. 5-6, 8-9.[3] That argument is unavailing. In *Whitman*, the employee alleged that the agency had violated his constitutional rights and a specific federal statute, 126 S. Ct. at 2015, whereas petitioners have alleged a violation of a collective bargaining agreement—and no more. Moreover, in each of the cases this Court cited in *Whitman*, some federal statute clearly gave rise to the underlying claim.[4] *Whitman*, therefore, does not aid

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[3] Given petitioners' current focus on Section 1331, they appear not to take issue with the Sixth Circuit's holding that neither 28 U.S.C. 1343 nor 28 U.S.C. 2201 constitutes a waiver of sovereign immunity or grant of jurisdiction in this case. Although petitioners now assert (Pet. 3) that they "brought this lawsuit pursuant to 5 U.S.C. § 7101 et. [*sic*] seq.," the complaint, as the Sixth Circuit discussed (Pet. App. A9), alleged that the district court had jurisdiction under 28 U.S.C. 1331, 1343, and 2201 (C.A. App. 5 (Compl. para. 1)), and never mentioned the CSRA at all. In any event, as this Court recognized in *Whitman*, Section 7121(a)(1) "does not confer jurisdiction." 126 S. Ct. at 2015.

[4] See *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642 (2002) (petitioner alleged that a state commission had violated the Telecommunications Act of 1996, thus giving a district court the authority to "review the Commission's order for compliance with federal law"); *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (plaintiff had sued under the Back Pay Act and the Tucker Act); *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 138-139 (1967) (petitioners' APA claim alleged that the agency's regulations exceeded the authority granted by the Federal Food, Drug, and Cosmetic Act).

petitioners in their effort to establish jurisdiction under Section 1331.[5]

In any event, even if petitioners' claims did arise under federal law, they still have failed to identify an express waiver of sovereign immunity. The petitioner in *Whitman* claimed that the APA waived sovereign immunity for his suit. See Pet. Br. at 13, 15, 18, 33, *Whitman* v. *Department of Transp.*, 126 S. Ct. 2014 (2006) (No. 04-1131). Here, by contrast, petitioners do not contest the Sixth Circuit's observation (Pet. App. A11) that they do not invoke the APA. That makes sense, since the APA waives immunity only for suits "seeking relief other than money damages." 5 U.S.C. 702. Petitioners' claims for "back pay, front pay, lost benefits, and compensatory damages" (C.A. App. 7) seek substitute or compensatory relief and thus fall outside the scope of the APA's waiver. See *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262-263 (1999).

Moreover, to the extent that petitioners also seek injunctive relief that could fall within the APA's waiver, they still have no cause of action in district court. The APA is inapplicable when another statute implicitly or explicitly "preclude[s] judicial review." 5 U.S.C. 701(a)(1). Here, the CSRA establishes a comprehensive

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[5] Petitioners do not argue that their claim arises under federal law because they have sued a federal agency for violation of an agreement that was entered into under federal law. See, *e.g.*, 5 U.S.C. 7111, 7114, 7117 (providing for collective bargaining agreements between federal agencies and recognized unions); cf. *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 126 S. Ct. 2121, 2135 (2006) (noting prior decisions "demonstrat[ing] that . . . private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes") (quoting *Jackson Transit Auth.* v. *Local Div. 1285*, 457 U.S. 15, 22 (1982)). This case therefore presents no occasion to consider that question.

remedial scheme that demonstrates Congress's intent to limit federal employees to the remedies explicitly provided by statute, which do not include district court review in cases like this.

The CSRA provides for a negotiated-grievance procedure that may be subject to binding arbitration, 5 U.S.C. 7121(b)(1)(C)(iii), for review of arbitral awards by the FLRA, 5 U.S.C. 7122(a), and for limited judicial review *in the courts of appeals*, 5 U.S.C. 7123(a). In *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court held that, in light of the CSRA's "integrated scheme of administrative and judicial review," *id.* at 445, "the absence of provision for [federal] employees to obtain judicial review" manifested "a considered congressional judgment that they should not have statutory entitlement to review for adverse action [taken against them for misconduct]." *Id.* at 448-449. Similarly, in *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 489 U.S. 527 (1989), the Court declined to infer a right of action in district court against a union, explaining that such a proceeding "would seriously undermine what we deem to be the congressional scheme, namely to leave the enforcement of union and agency duties under the Act to the [FLRA's] General Counsel and the FLRA and to *confine the courts to the role given them under the Act*." *Id.* at 536-537 (emphasis added).

In this case, the cause of action that petitioners infer from Section 7121(a)(1)'s reference to "exclusive administrative procedures" cannot be reconciled with the framework provided by *Fausto*, which analyzed "the purpose of the CSRA, the entirety of its text, and the structure of review that it establishes." 484 U.S. at 444. Thus, even if the court of appeals erred in finding that there is no jurisdiction under Section 1331 and that

there is no express waiver of federal sovereign immunity, it was still correct in affirming the dismissal of petitioners' complaint.

3. Petitioners devote more than two pages (Pet. 6-8) to arguing that, on the facts of this case, the settlement agreement between the union and HUD did not constitute an accord and satisfaction of their claims—an issue that was reached by neither court below. That fact-bound contention does not implicate any conflict and does not warrant this Court's review.

Moreover, petitioners' suggestion that the rejection of their claim leaves them without a remedy is not true. If petitioners were dissatisfied with the settlement agreement negotiated by their union representative—who represented them at their election[6]—they could have filed an unfair labor practice complaint with the FLRA, alleging that the union had breached its duty of fair representation. See *Karahalios*, 489 U.S. at 532, 534. An FLRA decision concerning such a claim would have been subject to review and enforcement in the court of appeals. 5 U.S.C. 7123(a) and (b).

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[6] Under the collective bargaining agreement, petitioners were entitled to represent themselves in pressing their grievance, or to request representation by the union (though only the union could ultimately have invoked arbitration). C.A. App. 58.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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